SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-806

ALBERT LOUIS KEEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

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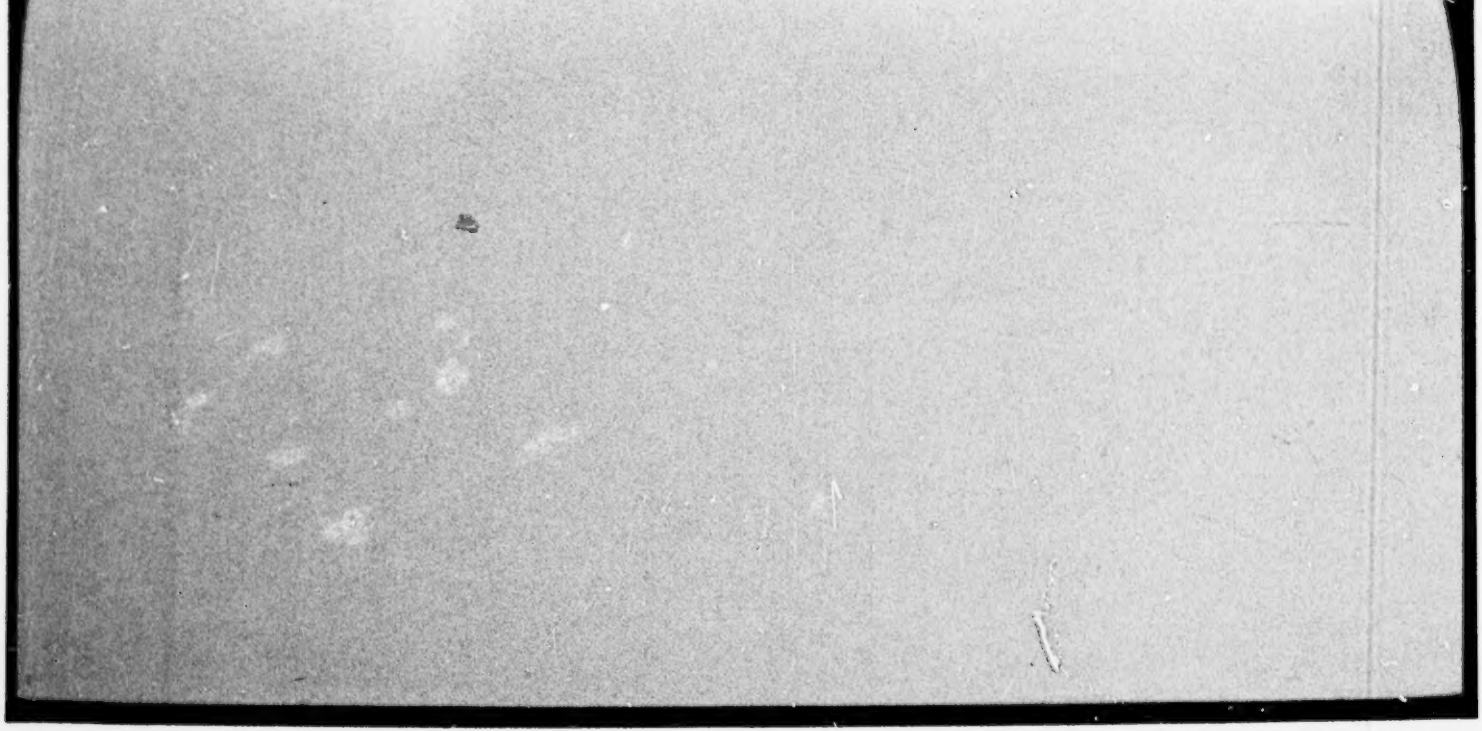

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IN THE

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, ALBERT LOUIS KEEN, a citizen of the United States of America, prays that this court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on the 27th day of November, 1974.

OPINIONS BELOW

The defendant was charged by indictment printed in Appendix A *infra.*

The judgment and sentence of the United States District Court for the Western District of Washington at Tacoma was entered on the 21st day of December, 1973, is unreported, and is printed in Appendix B, *infra.*

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment and sentence of the District Court was entered on the 27th day of November, 1974, has not yet been printed in the Federal Reporter, and is printed in Appendix C *infra*. That a stay of mandate has been issued pending action upon the writ of certiorari.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 27th day of November, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May the secret recording of a telephone conversation made without the knowledge or consent of the petitioner/defendant in violation of the State law be admitted in evidence against the petitioner/defendant?

2. After the focus of the investigation has settled on the petitioner/defendant, may a secret recording be made of a telephone conversation arranged by a government agent who has instructed and coached an informer to make the call with the intention of securing incriminating admissions from the petitioner/defendant without advising defendant of his constitutional rights be admitted in evidence against the petitioner/denfendant?

3. Where the indictment charged in one count that the petitioner / defendant attempted to hire Roy Doiron or another to blow up a boat, and the second count charged the petitioner/defendant himself blew

up the same boat, did the failure of the trial court to grant defendant's motion to elect or in the alternative to require separate trials upon the two counts and the trial of the two counts together deny the defendant a fair trial?

4. Where the indictment charged two separate offenses did the failure of the trial court to instruct that each was a separate crime deprive the defendant of a fair trial in this particular case?

5. When the trial court selected twenty-eight jurors, seating thirteen in the jury box in front of petitioner's counsel and fifteen behind him and then directed questions on voir dire to all of the jurors so that petitioner's counsel could not observe the particular jurors and their answers, was the defendant denied his Constitutional right to the effective assistance of counsel?

6. Was there sufficient evidence in the record to support the conviction of the defendant on the second count charging that the defendant himself blew up the boat or was petitioner denied a fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions under which the petitioner claims title, rights, privileges and immunities are: The Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution of the United States of America. They are printed in full in Appendix D, *infra*.

The statutory provisions are: 18 U.S.C. Section 2511(2)(d), 18 U.S.C. Section 2515 and that part of the laws of the State of Washington incorporated by reference into the Federal Statutes, RCW 9.73.030 and RCW 9.73.080. All are printed in Appendix E, *infra*.

STATEMENT

1. Jurisdiction and Prior Proceedings.

The Petitioner was charged by indictment in two counts, one charging that he attempted to hire a man to blow up a boat and the other that he blew up the boat himself in violation of 18 U.S.C. Section 844(i). That jurisdiction of the District Court was asserted under 18 U.S.C. Section 3231 and 18 U.S.C. Section 844(i). That jurisdiction of the Court of Appeals was asserted under Rule 4(b), Federal Rules of Appellate Procedure. Upon the jury's verdict of guilty on both counts Petitioner was sentenced to imprisonment for ten years on the first count and to twenty years on the second count, to be served concurrently.

Timely motions were made and denied to require the government to elect or in the alternative for separate trials on each charge and a proper request for an instruction that each count was a separate crime was refused.

2. Essential Facts.

Judge Goodwin began the trial by causing the clerk to call twenty-eight jurors, the first thirteen being seated in the jury box facing counsel and the remainder being seated behind counsel's back. Judge

Goodwin, over objection, on voir dire directed many questions to the entire panel and it was not possible for defense counsel to see all of the jurors as they reacted to the questions or even to distinguish their answers.

Evidence then developed that Petitioner ALBERT LOUIS KEEN and Barbara Keen were divorced and that she then had married Donald Johnson, the owner of a fishing boat (a bowpicker gillnetter) which was named "Hombre", was propelled by a gasoline engine, and was kept at moorage on the Hoquiam River in Washington. Petitioner was said to be jealous of Johnson.

On December 6, 1972, Donald Johnson and a friend, Donald Wilson, went aboard the boat, turned the ignition key and pulled the starter button, and a violent explosion occurred, sinking the boat and injuring both men. It was the government's theory that the explosion was a dynamite explosion set off by an electrical blasting cap wired into the engine starter button. The boat was raised the next day by police and fire authorities.

As to the first count, that the Petitioner had attempted to employ another to blow up the boat, the government relied upon the testimony of a known hoodlum and informer, Roy Doiron, that Petitioner had called and written him to hire him or another man to blow up the boat and that Petitioner had paid Doiron to do this, but that Doiron did not and never intended to do it or hire another to do it. On De-

cember 31, 1972, Doiron told Federal Agent, Greear, his story. After Greear had investigated further, checked handwriting, phone calls and other evidence, and the focus of the investigation had centered on Petitioner, ALBERT KEEN, on January 11, 1973, Federal Agent Greear took Doiron to the police station in Olympia, Washington and instructed him to place a telephone call to Petitioner and Greear coached and instructed Doiron what to say, with the intention of securing damaging admissions from Petitioner. Greear then monitored and recorded the call on an electronic tape recorder, without the knowledge of the defendant. Petitioner was not advised as to his Constitutional rights. The recording contained very damaging admissions, was admitted in evidence and played to the jury.

Handwriting evidence, phone bills and evidence of payment to Doiron were presented in support of the first Count.

As to the second Count, that the petitioner blew up the boat himself, the government's evidence showed that on December 5, 1972, the day before the explosion there was a severe snowstorm and it would have been possible for someone to have placed the explosives in the boat without being seen, but prior to that day and on December 6, 1972, the day of the explosion, the weather was clear and the boat would have been clearly visible at all times, day and night, to the occupants of a restaurant and bar above the moorage.

Witnesses for the government, Patrick Elliott and

his wife Carol Elliott, testified that on December 5, 1972, the petitioner was at their home for dinner during the snowstorm and that petitioner fell asleep in his chair watching television until 10:00 p.m.

Federal agents had searched petitioner's boat and house and found a coil of black safety fuse and some dynamite copper caps (neither being of the kind the government contended were used in the explosion). They also found hacksaws and blades which had recently been used but not, by the government's own expert testimony, to cut the padlock of the boat "Hombre" to gain entry to plant the explosives as contended by the government. Search for dynamite and chemical residues of dynamite in petitioner's boat and house were made but none was found. Screwdrivers and chisels were taken from petitioner and tested against materials taken from the boat, but results were negative. Other experts were called who had examined the boat and testified that the explosion had been caused by dynamite ignited by electrical caps activated by the starter button. There was no evidence to show the petitioner had been near the boat "Hombre" at any time prior to the explosion.

The petitioner did not take the stand and offered character evidence in his defense.

REASONS FOR GRANTING THE WRIT

1. Whether the secret recording of a telephone conversation, made without the knowledge or consent of the defendant, in violation of the state law may be admitted in evidence against the defendant/petitioner

presents an important question of interpretation of the Federal statute, 18 U.S.C. Section 2511(2)(d) which provides as follows.

> "(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to a communication or where one of the parties to the communication has given prior consent to such interception *unless such communication is intercepted for the purpose of committing any . . . act in violation of . . . the laws . . . of any State.*" (italics added)

The laws of the State of Washington prohibit the interception or recording of any conversation unless both parties to the conversation have knowledge thereof and consent to the interception or recording:

> RCW 9.73.030: " . . . It shall be unlawful for an individual . . . to intercept, record or divulge:
>
> (1) Private communication transmitted by telephone, telegraph, radio or other device, between two or more individuals between points or within or without the State by any device electronic or otherwise . . . without first obtaining the consent to all participants in the communication."
>
> RCW 9.73.080: "Any person who shall violate 9.73.030 shall be guilty of a gross misdemeanor."

Therefore under the laws of the State of Washington the action of Agent Greear in listening to and recording the conversation between Doiron and petitioner was a gross misdemeanor. Under the Federal Statute above cited, his conduct being a violation of the Washington law is therefore a violation of the United States Code, 18 U.S.C. 2511(2)(d). Further, under 18 U.S.C. Section 2515:

"... no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceedings in or before any court, grand jury ..."

The decision of the Court of Appeals begs the question in that it bases its holding on the exclusion of the evidence upon Constitutional grounds, when in the petitioner's case the exclusionary rule is statutory by virtue of the law of Congress.

Any other construction of the Statute would violate its clear language and more than that would violate the concept of the separation of state and federal powers and the Tenth Amendment of the Federal Constitution. Congress could never have intended this clear language to authorize a federal agent to commit a crime under state law.

Moreover, there would have been plenty of time for the Government Agent to have secured proper authority from a court authorizing the interception. 18 U.S.C. Sec. 2516. None was secured. This violated 18 U.S.C. Sec. 2510 et seq. *United States v. Kahn*, 471 F.2d 191, (7th Cir. 1972), cert den. 411 U.S. 980, 36 L. Ed.2d 956, 93 S.Ct. 2175; *Elkins v. U.S.* 206, 80 S. Ct. 1437, 4 L.Ed.2d 1669 (1960).

2. After the focus of the investigation had settled on the defendant, may a secret recording be made of a telephone conversation arranged by a government agent who has instructed and coached an informer to make the call with the intention of securing incriminating admissions from the defendant without advis-

ing the defendant of his Constitutional rights be admitted in evidence against the defendant?

The Constitution does not permit it and the admission of the evidence violated the defendant's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution.

As the United States Supreme Court held in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964) when the investigation is no longer a general inquiry but has begun to focus on a particular suspect:

> " . . . that when the process shifts from investigatory to accusatory . . . when its focus is on the accused and its purpose is to elicit a confession . . . our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult with his lawyer."

In this case, on January 11, 1973, Federal Agent Greear instructed and coached government informant Doiron to make the telephone call with the intention of securing a confession or incriminating admission from the defendant after the Federal Agent Greear already knew of the facts which were later presented to the trial Court to prove the defendant's guilt and the focus of the investigation was already upon the defendant. To secretly wiretap that telephone conversation was in violation of the defendant's rights under the Constitution. *Massiah v. United States,* 377 U. S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964). To hold otherwise would deprive the defendant of the effective representation of counsel.

3. Did the trial of the two counts of the indictment together deny the defendant a fair trial?

Timely motions were made to require the government to elect and in the alternative for separate trials, were denied and the two counts tried together. Each of the counts are violations of the same section of the Statute, 18 U.S.C. 844(i). When the attempt was allegedly made in one way and the crime was allegedly done in another the defendant could not properly make his defense. When the two counts were tried together the defendant could not testify for himself on the second count without subjecting himself to cross examination on the first count, thus forcing him to testify against himself on the first count. But if he did not take the stand as to the second cause of action, he could not develop his defense to the weak case presented by the government in the second count. This deprived him of his right under the Fifth Amendment not to be a witness against himself.

It was an abuse of discretion for the trial court not to order an election or separate trials on each count because of the great prejudice to the defendant.

Rules of Criminal Procedure, Rules 8, 12 and 14.

Drew v. United States, 331 F.2d 85 (D.C. 1964).

Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894).

McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896).

United States v. Lotsch, 102 F.2d 35 (1939).

United States v. Clayton, 450 F.2d 16 (1971).

4. When the trial court refused to give the instruction that a separate crime was charged by each count of the indictment and that the jury should consider each count separately, it denied the defendant due process of law. Because the evidence of the attempt was so great and the proof of the second count was so small the prejudice to the defendant was overwhelming. See the cases cited immediately above.

5. The manner in which Judge Goodwin selected the jury deprived the petitioner of the effective assistance of counsel. When the Judge caused the clerk to select twenty-eight jurors, thirteen being seated in the jury box in front of counsel and the remainder in the court room behind him, and over objection directed questions to the panel as a whole, it was not possible for defendant's counsel to observe the reactions of the jurors to the questions because he could not see them. He could not place himself in a position where he could have heard them all or seen them all, nor was he permitted to direct questions to particular jurors. Consequently counsel for the petitioner could not intelligently and skillfully exercise the defendant's peremptory challenges. The petitioner was thereby denied a fair and impartial jury trial and denied the right to effective counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

6. As to the Second Count of the indictment, so little evidence was presented that submitting the matter to the jury and failing to dismiss Count II deprived the petitioner of a fair trial. There was suf-

ficient evidence in the record to show the defendant had a motive to blow up the boat; that the boat was blown up by dynamite and that some one was injured. There was no evidence that the defendant had the opportunity to place the explosives, very little evidence that he had the skill to place the explosives to be fired in the manner required by the government's theory of the case, and five fatal defects in the government's own proof.

It was the government's expert's testimony that the explosion was by dynamite ignited by electrical blasting caps which were in turn wired to the starter box and fired when the electrical circuit was completed by pulling the starter. The government further asserted that the defendant Keen had called his former wife, Barbara Johnson, and told her that his boat had been entered by someone cutting his padlock. Allegedly, petitioner made this call with the intention that it would allay suspicion when Donald Johnson entered his boat and found the padlock cut. When Donald Johnson entered his boat, the padlock was cut and when he searched and found nothing missing, he did pull the starter to start the boat's engine and the explosion occurred.

The five fatal failures of proof in the government's case were as follows:

1. The government proved a snowstorm on the night of December 5, 1972, during which time the dynamite could have been placed in the boat "Hombre" without the perpetuator being seen — at other times

he would have been in full view of the occupants of Chuck's Hideaway Restaurant. *But,* the government's witness Elliott proved that during this time the defendant was at Elliott's home having dinner and sleeping by Elliott's television set. *No Opportunity.*

2. The government by search warrant found blasting caps in the defendant's house, evidence of which was admitted over objection, but these blasting caps were not electrical caps and could not have been used to set off the explosion. No evidence of any dynamite was found although a search of the defendant's house for chemical residues was made. (Tr. 2, p. 325). *No Means.*

3. The government found the padlock from the door of the boat "Hombre" and by search warrant took from the defendant a hacksaw and blade and determined that the blade had been recently used for cutting metal and that metal filings were in the saw teeth but scientific examination by the government's experts showed that the filings in the saw blade did not come from the padlock. (Tr. 2, p. 326; Ex. D and E; Tr. 4, p. 774-775). *Someone else's hacksaw had been used to cut the padlock on the boat "Hombre".*

4. The marks on the starter switch box were examined and compared with the screwdrivers taken from the defendant by search warrant by the government's experts and the results were negative. (Tr. 2, p. 327; Ex. D and E). *Someone else's tools were used to tamper with the starter switch box.*

5. Chisel marks were found upon the boat "Hom-

bre" and a chisel with paint residues on it was taken from the defendant by search warrant and the paint was compared by the government's scientific experts and the results were negative. (Tr. 2, p. 323; Ex. D, E; Tr. 4, p. 772-773). *Someone else's chisel was used to enter the boat "Hombre".*

Taken together, there was not sufficient proof to sustain a conviction on the second count.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK AUGUST PETERS,
Counsel for Petitioner.

December 20, 1974

APPENDIX A

INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 50-73D3

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

ALBERT LOUIS KEEN, *Defendant*.

The Grand Jury charges:

Count I

That during the period beginning about September 15, 1972, the exact date being unknown, and continuing until about December 1, 1972, in the vicinity of Hoquiam and Yelm in the Western District of Washington, ALBERT LOUIS KEEN wilfully and knowingly and with intent to cause the injury or death of Donald Lee Johnson did attempt to maliciously damage and destroy by means of an explosive a vehicle or other personal property used in interstate commerce in an activity affecting interstate commerce by attempting to hire Roy Edward Doiron and unknown third persons to blow up by the use of explosives the duly registered commercial fishing vessel "Hombre", and thereby affect the injury or death of Donald Lee Johnson, said vessel being then owned by Donald Lee Johnson and docked at Hoquiam and for which Albert Louis Keen did pay Roy Edward Doiron the sum of $700.00.

All in violation of 18 U.S.C. 844(i).

Count II

That on or about December 6, 1972 at Hoquiam, in the Western District of Washington, ALBERT LOUIS

KEEN wilfully, knowingly and maliciously did damage and destroy by means of an explosive the duly registered commercial fishing vessel "Hombre", the personal property of Donald Lee Johnson used in interstate commerce and in an activity affecting interstate commerce, and by the resulting explosion did thereby cause the personal injury of Donald Lee Johnson and Donald Wilson.

All in violation of 18 U.S.C. 844(i).

A True Bill. Dated: July 10, 1973.

Signed: ROBERT H. JAEGER, Foreman.

Signed: Stan Pitkin, United States Attorney

Signed: J. S. Obenour,

Assistant United States Attorney

APPENDIX B

JUDGMENT AND SENTENCE

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 50-73D3

UNITED STATES OF AMERICA,

vs.

ALBERT LOUIS KEEN

On this 21st Day of December, 1973 came the attorney for the government and the defendant appeared in person and by Frank A. Peters, his attorney, and the Probation Officer for this District having made a pre-sentence investigation and reported to the Court.

It is Adjudged that the defendant upon his plea of not guilty, a jury having been regularly empaneled and a trial held on the merits and a verdict of guilty rendered by the jury of a violation of 18 U.S.C. 844(i) (Attempt and Destruction of Vessel in Interstate Commerce Causing Injury to Person), as charged in Counts I and II of the Indictment, and the defendant's counsel having made a statement in his behalf; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on Count I of the Indict-

ment, and twenty (20) years on said Count II of the Indictment, the sentence imposed in Count I to be served concurrently with and not consecutively to the sentence imposed in Count II of the Indictment.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WILLIAM N. GOODWIN

United States District Judge

APPENDIX C

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALBERT LOUIS KEEN,

Defendant-Appellant.

[November 27, 1974]

Appeal from the United States District Court
for the Western District of Washington

Before: DUNIWAY and CHOY, Circuit Judges,
and SMITH,* District Judge

CHOY, Circuit Judge:

On December 6, 1972, a commercial fishing boat, the Hombre, was tied to a dock in Hoquiam, Washington. Its owner Donald Johnson, accompanied by a friend, stepped aboard and fired the ignition. The boat exploded and sank, Johnson lost both legs. The government produced evidence that Albert Keen some weeks earlier had attempted to hire some men to bomb the Hombre, and, failing in that attempt, had himself wired a bomb to the ignition. Keen was convicted by a jury of two violations of 18 U.S.C. § 844(i);[1] first

*The Honorable Russell E. Smith, Chief Judge, United States District Court for the District of Montana, sitting by designation.

[1] 18 U.S.C. §844(i):

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. . . .

for attempting to destroy, by means of an explosive planted by hired third parties, property used in interstate commerce; and second for accomplishing this goal himself. He appeals. We affirm the conviction.

Keen's principal contention is that the trial judge erred in admitting into evidence a damaging telephone conversation that had been recorded in violation of state law. A government agent recorded a conversation between Keen and an informer named Roy Doiron with Doiron's prior consent. Under the laws of the State of Washington, a wire tap is illegal unless *both* parties to the conversation consent. RCW § 9.73.030. The Government relies on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*, as permitting governmental wire taps without a warrant when *one* party consents. 18 U.S.C. § 2511(2)(c).[2] Section 2511(2)(c) is worded as an exception to that section's general prohibition of judicially non-authorized wire taps, not as a positive authorization of such taps. In other words, section 2511(2)(c) left prior law of consensual wire taps intact. It is not clear, therefore, that Congress showed an intention to displace more rigorous requirements found in state laws.

Nevertheless, Keen overlooks the fact that the exclusionary rule is a remedy integrally bound up with the constitutional protections of the fourth amendment.[3] *Weeks v. United States*, 232 U.S. 383 (1914):

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[2] 18 U.S.C. §2511(2)(c):

(c) It shall not be unlawful *under this chapter* for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communicaton or one of the parties to the communication has given prior consent to such interception. [emphasis added]

[3] The exclusionary rule also bars use of evidence obtained in violation of other constitutional guarantees. *See., e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961). In addition, federal law may prohibit explicitly the admission of certain types of evidence, Nardone v. United States, 302 U.S. 379 (1937); Lee v. Florida, 392 U.S. 378 (1968) (Communications Act of 1934, ch.652, § 605, 48 Stat. 1103, forbidding divulgence of intercepted telephone messages, prohibited their introduction as evidence in court). The Court has also excluded confessions obtained in violation of the Federal Rules of Criminal Procedure. Mallory v. United States, 354 U.S. 449 (1957).

Mapp v. Ohio, 367 U.S. 643 (1961). It is a constitutional limitation on the introduction of evidence possessing conceded probative value. The Supreme Court has not been liberal in extending application of the exclusionary rule; it has restricted its application in wiretap cases to those whose fourth amendment rights have been violated directly. *Alderman v. United States*, 394 U.S. 165 (1969). Wire taps obtained with the consent of one party to a conversation do not violate the fourth amendment, however. *Holmes v. Burr*, 486 F.2d 55 (9th Cir.), *cert denied*, 414 U.S. 1116 (1973). *See United States v. White*, 401 U.S. 745 (1971).

Where no constitutional right has been abused, the admissibility of evidence is governed by common law principles, not by local statute. *Wolfle v. United States*, 291 U.S. 7, 13 (1934); *Olmstead v. United States*, 277 U.S. 438, 469 (1928); *United States v. Woodall*, 438 F.2d. 1317, 1327 (5th Cir. 1970), *cert denied*, 403 U. S. 933 (1971). *See* Fed. R. Crim. P. 26. At common law, evidence was admissible regardless of its illegal origins. *United States v. Blue*, 384 U.S. 251, 255 (1966). Therefore, wiretap evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law. *On Lee v. United States*, 343 U.S. 747, 754-755 (1952); *Olmstead v. United States*, 277 U.S. 438, 469 (1928); *United States v. American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 241, 253 (W.D.Pa. 1967), *rev'd on other grounds*, 388 F.2d 201 (3rd Cir.) *cert. denied*, 390 U.S. 922 (1968). *Cf. Zaroogian v. United States*, 367 F.2d 959 (1st Cir. 1966).

Doiron's recorded call to Keen was not an attempt to elicit a confession after the process had shifted from investigatory to accusatory within the meaning of *Escobedo v. Illinois*, 378 U.S. 478 (1964). The Court in *Escobedo* was concerned with the unequal contest between a suspect taken into custody and a

police investigator.[4] "The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture." 378 U.S. at 489 *quoting* 8 Wigmore, Evidence (3d ed. 1940) at 309. Keen believed he was talking to an acquaintance by telephone, not to the police. He was subjected to no possibility of moral or physical coercion. He was thus not deprived of his sixth amendment right to counsel.

Keen's other contentions can be disposed of rather swiftly. The district court exercised its discretion soundly in refusing to order separate trials on the two counts of the indictment. Keen's destruction of the Hombre and his earlier attempts to employ others to do the deed were natural parts of a single narrative. *Bayless v. United States*, 381 F.2d 67, 72 (9th Cir. 1967). Evidence produced at a trial on one count would be admissible at a trial on the other to show Keen's identity, motive, intent, and the existence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other . . . ." *Drew v. United States*, 331 F.2d 85, 90 (D.C.Cir. 1964). Under these circumstances, furthermore, the court did not abuse its discretion in refusing to instruct the jury that each charge and the evidence pertaining to it should be considered separately.

The jury was selected under the "Arizona system." Thirteen prospective jurors were seated in the jury box and 15 more were seated behind counsel during voir dire. Counsel objects that he was unable to watch the reactions of all the jurors, especially while the judge interrogated the panel collectively. He claims that he consequently was unable to make intelligent use of his peremptory challenges. A trial judge cer-

[4]See Miranda v. Arizona, 384 U.S. 436, 444 (1966):

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [*Id.* n. 4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."

tainly should endeavor during voir dire to give both sides a maximum opportunity to assess the predispositions and reactions of prospective jurors. Nonetheless, he is afforded a large measure of discretion in setting procedures for jury selection. *Haslam v. United States*, 431 F.2d 362, 364 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971). The record indicates a scrupulous attempt by the trial judge to be fair to Keen; we find no abuse of his discretion.

Keen argues that the government failed to produce evidence of the specific effect which Johnson's boat had on interstate commerce. However, there was ample evidence that the boat was used in commercial fishing and that the catch was shipped interstate. Commercial fishing of the type concerned here is an industry affecting interstate commerce, and the court properly so instructed the jury. To the extent that Keen challenges the power of Congress to enact §844 (i), his argument is foreclosed by *Perez v. United States*, 402 U.S. 146 (1971), in which the Supreme Court clearly rejected an analogous contention.

We have considered carefully appellant's objections to the sufficiency of the evidence. We cannot say that, considered in a light most favorable to the government, the evidence did not permit the jury to conclude that Keen was guilty beyond a reasonable doubt. *United States v. Gardner*, 475 F.2d 1273, 1275 (9th Cir. 1973).

APPENDIX D

APPLICABLE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

1. Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . "

2. Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

3. Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

4. Ninth Amendment

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

5. Tenth Amendment

"The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

APPENDIX E

FEDERAL STATUTES

Title 18

Sec. 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through a wire, cable or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) wilfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) wilfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Sec. 844

(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if any personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

APPENDIX F

LAWS OF THE STATE OF WASHINGTON

9.73.030 Intercepting, recording or divulging private communication—Consent required—Exceptions

Except as otherwise provided in this chapter, it shall be unlawful for an individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, record or divulge any:

(1) Private communication transmitted by telephone, telegraph, radio or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and to transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(2) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

An employee of any regularly published newspaper, magazine, wire service, radio station or television station acting in the course of bona fide news gathering duties on a full time or contractual or part time basis, shall be deemed to have consent to record and divulge communications otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, radio or television station from divulging the communication. [Added by Laws 1st Ex Sess 1967 ch 93 § 1.]

9.73.080—Penalty

Any person who shall violate RCW 9.73.030 shall be

guilty of a gross misdemeanor. [Added by Laws 1st Ex Sess 1967 ch 93 §6.]

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-806

ALBERT LOUIS KEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported. The opinion of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on November 27, 1974. The petition for a writ of certiorari was filed on December 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a recording of a telephone conversation in conformity with the Constitution and with federal law is inadmissible in a federal prosecution because of a violation of state law.

2. Whether the charges were properly joined.

3. Whether the judge properly selected the jury.

4. Whether the evidence was sufficient to convict on one of the counts.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on two counts of violating 18 U.S.C. 844(i), which punishes attempted or actual malicious damage or destruction, by use of an explosive device, of property used in interstate commerce or in an activity affecting interstate commerce. He was sentenced to concurrent terms of ten years' imprisonment on the first count and twenty years' imprisonment on the second. The court of appeals affirmed in a thorough opinion, on which we substantially rely (Pet. App. C).

Petitioner was convicted of planting dynamite aboard the fishing vessel "Hombre", which exploded and sank the boat, blew off both legs of the owner of the boat, Donald Johnson, and caused extensive injuries to his companion, Donald Wilson (Tr. 495-508). Petitioner was also convicted of having attempted this sabotage a few months earlier by paying a former employee, Roy Doiron, $700 to have the boat blown up.

1. On the night of December 6, 1972, the "Hombre" blew up and sank while tied at a dock on the Hoquiam River in Hoquiam, Washington. The boat was owned by Donald Johnson and used by him for part time fishing. Johnson had not been fishing regularly because the fishing was slow and the weather generally bad at that time of the year. Johnson's habit was to go out only if it was reported that a lot of fish were coming in (Tr. 619). On

December 5, when Johnson got home from work, his wife, Barbara Keen Johnson, ex-wife of the petitioner, told him that she had received a telephone call from petitioner in which he told her that his boat had been broken into the night before. Petitioner had said that the padlock on the boat had been sawed off and that someone had taken some fish and his groceries. He also informed her that another fisherman had caught five or six hundred pounds of fish recently in the area in which Johnson fished (Tr. 345-346).

The call from petitioner was regarded with suspicion by the Johnsons for several reasons. In September, 1972, Johnson had married Barbara after numerous threats and hostile confrontations with petitioner (*e.g.*, Tr. 334, 335, 515-517, 558, 610-612). In the ensuing months, petitioner called his former wife daily. However, those calls had abruptly terminated about two weeks prior to the call on December 5. It was unusual for petitioner to report a good catch of fish, but Johnson testified that, after hearing about the call, he decided he would go fishing the next night (Tr. 621-622). Petitioner called the Johnson home again on the afternoon of the 6th, and Barbara Johnson told him her husband intended to go out that night (Tr. 346).

When Johnson and his friend Wilson boarded the "Hombre" on the evening of December 6th, Johnson immediately noticed that the padlock had been sawed off, but he could not discern anything missing or otherwise awry (Tr. 623). As Johnson started the motor, the blast occurred. Experts testified that the explosion was probably caused by sticks of dynamite wired to the starter engine (Tr. 737-748). When Wilson was pulled onto the dock, he was yelling, "The lock was cut, the lock was cut" (Tr. 172). Immediately following the ex-

plosion, petitioner was observed at the top of the dock ramp. He asked one of the rescuers whom he was carrying. When told that it was Johnson, a look came over petitioner that puzzled the witness and that he described in these words: "he looked like he was glad that it happened" (Tr. 174-175). On the following day, photographs were taken at the accident scene, and again petitioner was seen (Tr. 53). Petitioner's friends testified that on December 7, he was visibly upset, unlike himself, drinking to unusual excess, and talked about committing suicide (Tr. 176-179).

2. The evidence further showed that petitioner had attempted previously to have the boat blown up. He had clarified his motives when he told Roy Doiron, the man with whom he was negotiating to do the sabotage, that "he didn't really care if it [the boat] got blown up or not, he just wanted the son of a bitch blown up that owned it" (Tr. 388). When the arrangement for having the job done by others collapsed,[1] petitioner sought Doiron's advice on how he could dynamite the boat himself. Doiron suggested the use of a remote control device so that petitioner could safely explode the dynamite from a distance of "from three to five miles away" and that petitioner call a hobby shop to find out about equipment (Tr. 403). The owner of a hobby shop some distance away received a call from someone about that time ("in the fall of the year") in the Hoquiam area inquiring about radio control equipment which was not to be used in model airplanes but for "other intentions." The caller would not disclose the use he contemplated (Tr. 465). Petitioner's telephone bill recorded a call to the Hobby Shop number on November 17, 1972 (Tr. 464).

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[1]Petitioner carried on correspondence and telephone calls with Doiron beginning in August 1972, in the course of which Doiron purported to have hired men to blow up the "Hombre". Doiron reported to petitioner that the $700 petitioner had paid him had been "ripped off" by the men. In fact, Doiron evidently had no intention of performing the job, but led petitioner on in order to obtain the money, which he needed (Tr. 367-400).

Petitioner's readiness to use explosives was demonstrated by testimony that he had discussed blowing up a non-union barbershop, as well as blowing up his boat for the insurance money, on occasions prior to the Johnson accident (Tr. 362, 365-366). Some years earlier, petitioner had actual experience in using dynamite. He also had told a friend at the time that he had a key to a building where loggers stored explosives (Tr. 532, 535-536).

During the course of the investigation, petitioner gave a statement to agents of the Bureau of Alcohol, Tobacco, and Firearms in which he denied harboring animosity or ill will toward Johnson for his relationship with Barbara, denied having argued with him or threatened him in any manner, and further denied having ever suggested the use of any type of explosives in a criminal manner at any time. Petitioner claimed that in October, 1972 he loaned the sum of $700 to an acquaintance who had since disappeared (Tr. 303-305).

On New Year's Day, petitioner told Doiron that he was suspected and asked him not "to blow the whistle," and, specifically, to deny having been paid $700 (Tr. 409-410). Subsequently, Doiron received a message that petitioner wanted him to call. Doiron made a collect call from an Olympia, Washington, police station to petitioner's barbershop, which was recorded by Special Agent Greear and played at trial. This conversation indicated petitioner's concern at being investigated. He instructed Doiron not to reveal the earlier $700 payment but, despite the latter's repeated prodding, claimed that he did not know who caused the blast on the "Hombre" (Tr. 420, 680; Supp to Tr.).

ARGUMENT

1. Petitioner claims that the recording of his telephone conversation with Doiron, made in accordance with 18 U.S.C. 2511(2)(c), should not have been admitted in evi-

dence because it was made in violation of the law of the State of Washington and because no *Miranda* warnings were given him at the start of the conversation.

In recording the telephone call that petitioner requested Doiron to make, Special Agent Greear acted properly under 18 U.S.C. 2511(c)(2).[2] Although under the laws of the State of Washington the recording of a conversation is illegal unless both parties to the conversation consent, it is settled that recordings obtained with the consent of only one party to a conversation do not violate the Fourth Amendment. *United States* v. *White*, 401 U.S. 745; *Holmes* v. *Burr*, 486 F.2d 55 (C.A. 9). The court of appeals correctly concluded that the admissibility of the evidence in this federal prosecution is governed by federal law (Pet. App. C, A-7):

> Where no constitutional right has been abused, the admissibility of evidence is governed by common law principles, not by local statute. *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Olmstead* v. *United States*, 277 U.S. 438, 469 (1928); *United States* v. *Woodall*, 438 F.2d 1317, 1327 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971). *See* Fed. R. Crim. P. 26. At common law, evidence was admissible regardless of its illegal origins. *United States* v. *Blue*, 384 U.S. 251, 255 (1966). Therefore, wiretap evidence obtained in viola-

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[2]Petitioner mistakenly cites 18 U.S.C. 2511(2)(d), which concerns recordings made by private parties (*i.e.*, persons not acting under color of law), as authority for the recorded conversations. However, since the recording was made by a government agent, it was authorized under 18 U.S.C. 2511(2)(c), which provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

> tion of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law. *On Lee* v. *United States*, 343 U.S. 747, 754-755 (1952); *Olmstead* v. *United States*, 277 U.S. 438, 469 (1928); *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 241, 253 (W.D. Pa. 1967), *rev'd on other grounds*, 388 F.2d 201 (3d Cir.) *cert. denied*, 390 U.S. 922 (1968). *Cf. Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966).

Furthermore, there is manifestly no requirement that the non-consenting party be given *Miranda* warnings, or that he be told that the conversation is being recorded. The need for warnings and other related protections arises only as to an accused in custody, which petitioner was not.

2. Petitioner's claim that the joinder of offenses was improper is likewise without merit. It is well settled that a ruling on a motion for a severance is within the sound discretion of the trial court and will not be disturbed unless there is a showing that there was an abuse of discretion. The joinder of the count relating to petitioner's attempt to destroy the "Hombre" in the same indictment with the count charging the successful destruction was proper under Rule 8(a), Fed. R. Crim. P. These offenses were part of a common scheme or plan. The court of appeals thus properly rejected petitioner's claim (Pet. App. C, A-8):

> The district court exercised its discretion soundly in refusing to order separate trials on the two counts of the indictment. Keen's destruction of the Hombre and his earlier attempts to employ others to do the deed were natural parts of a single narrative. *Bayless* v. *United States*, 381 F.2d 67, 72 (9th Cir. 1967).

Evidence produced at a trial on one count would be admissible at a trial on the other to show Keen's *identity*, motive, intent, and the existence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other . . . ." *Drew* v. *United States*, 331 F.2d 85, 90 (D.C. Cir. 1964). Under these circumstances, furthermore, the court did not abuse its discretion in refusing to instruct the jury that each charge and the evidence pertaining to it should be considered separately.

3. Petitioner's other contentions are baseless.

The trial judge is afforded wide latitude in establishing the procedure for selection of jurors. *Haslam* v. *United States*, 431 F.2d 362 (C.A. 9), certiorari denied, 402 U.S. 976. There is no showing by petitioner that his rights were prejudiced by the method used in this case.[3] As the court below found (Pet. App. C, A-9): "The record indicates a scrupulous attempt by the trial judge to be fair to Keen; we find no abuse of [the trial court's] discretion."

Finally, viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), there was sufficient evidence for the jury's finding that petitioner had caused the destruction of the "Hombre." Evidence of petitioner's phone call to the Johnson home on the day prior to the accident reporting successful fishing (which could be interpreted as made for the purpose of luring Johnson aboard the "Hombre"), and reporting the entry and theft aboard his own boat (which could be viewed as implying a current spate of vandalism, thus mitigating Johnson's suspicions when he found his own lock broken); petitioner's familiarity with and willing-

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[3]The jury was selected under the "Arizona system", *i.e.*, 12 prospective jurors were seated in the jury box and 15 were seated behind counsel during the *voir dire*.

ness to use explosives; petitioner's presence at the boat dock immediately following the blast, as well as the next day when the investigation was going on; the testimony of friends that he was extremely upset; his prior attempt to have others destroy the boat and Johnson; and the evidence of his extremely emotional attitude toward Johnson, provided ample basis for the jury to convict on the second count.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

DOJ-1975-03